BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

THOMAS HERD	)	
Claimant	)	
	)	
VS.	)	
	)	
M. BRUENGER & CO., INC.	)	
Respondent	)	Docket No. 1,069,472
	)	
AND	)	
	)	
GREAT WEST CASUALTY CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the June 19, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark. Mitchell W. Rice of Hutchinson, Kansas, appeared for claimant. Eric T. Lanham of Kansas City, Kansas, appeared for respondent.

The ALJ found claimant's January 15, 2014, accident is the prevailing factor for claimant's left knee problems. Therefore, the ALJ ordered respondent to furnish the names of two physicians for selection of one by claimant for treatment and ordered all medical expenses paid.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the June 19, 2014, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues claimant did not sustain an accidental injury arising out of and in the course of his employment. Moreover, respondent contends any alleged work injury was not the prevailing factor in causing claimant's current need for treatment. Respondent argues claimant's accident was the result of a personal or neutral risk; therefore, the ALJ's Order granting benefits should be reversed.

Claimant did not file a brief with the Board.

The issues for the Board's review are:

1. Did claimant suffer an injury arising out of and in the course of his employment with respondent?

2. Was the injury the prevailing factor in causing claimant's present left knee problems?

FINDINGS OF FACT

Claimant was employed by respondent as a semi-truck driver for approximately four years. Claimant was hired with some disability, as his right leg was amputated above the knee in 1974 following a motorcycle accident. Claimant explained he wore a prosthetic leg when he was first hired, but entering and exiting the truck while wearing the prosthesis caused his knee to twist and hurt. Claimant eventually stopped wearing the prosthetic leg and instead utilized crutches, as the truck was modified with a handrail for ease of entering and exiting. Claimant drove with his left leg only, and he stated he basically sat in the truck's seat for 11 hours per day. Claimant's sole duty at respondent was driving the truck; he was not required to load or unload the truck.

On January 15, 2014, claimant stated he exited his truck and sat on its step while he waited for a coworker, Andrew Reynolds, to arrive in a pickup truck. Respondent requires its employees to submit to mandatory drug testing, and Mr. Reynolds was going to transport claimant to the testing facility in the pickup. Claimant testified:

> When they came around to bring the pickup around to take me to the drug test, I went to get up on my crutches, and I had a real sharp pain in my knee. I just about fell but I didn't because I sat back on the step real quick. And then from then on it was just real bad pain.[1]

Claimant was assisted into the pickup and taken to the drug screen by Mr. Reynolds. Mr. Reynolds testified he did not recall claimant saying he suffered an injury to his knee, but claimant did say his knee was "bothering him" during the ride to the facility.[2] Mr. Reynolds stated he did not see claimant sustain any specific injury to the left knee when claimant exited his truck, and he did not hear claimant's left knee pop. Claimant told Mr. Reynolds "the bones were grinding and that he had a lot of pain in [the left knee] a lot

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[1] P.H. Trans. at 7.

[2] *Id*. at 36.

of the time."[3] Claimant testified his left knee is "always sore," though "not to the extent [he] couldn't use it."[4] Claimant stated that although he has a history of left knee pain, he had never previously experienced the sharp pain he felt on January 15, 2014. Claimant was unable to put weight on his left knee following the incident.

Mr. Reynolds used a wheelchair to transport claimant to and from the pickup to the testing facility. Following the appointment, Mr. Reynolds and claimant returned to respondent. Claimant could not enter his truck without assistance, and he cut his left leg on the edge of the truck while getting into his seat. A supervisor informed claimant he would not allow claimant to work until his leg healed, and claimant was sent home.

Medical records indicate claimant was diagnosed with severe osteoarthritis to the left knee in 2002, and he underwent a series of injections to the knee from 2002 through 2013 with Dr. James Lairmore of the Hutchinson Clinic. Records from 2005 note Dr. Lairmore determined claimant had severe osteoarthritis of the left knee and would require ongoing injections, as claimant was a poor candidate for a total knee arthroplasty because of his medical history.

Claimant presented to the Hutchinson Clinic on January 17, 2014, and treated with Dr. Gregory Miller. Dr. Miller recorded claimant's history of the incident:

> About 3 PM 2 days ago getting out of truck, was almost standing on ground, put weight on left LE with a little twist motion and left knee gave way. Heard a pop. Sudden pain. Did not fall down. Sat on truck step. . . . Could not get back into truck and was climbing back into truck and cut/scratched ares [*sic*] on the left leg on sharp edges on ladder. . . . Cannot bear weight on LLE due to knee pain.[5]

Dr. Miller assessed claimant with knee osteoarthritis, knee internal derangement, knee injury, knee joint pain, and leg abrasion. Dr. Miller prescribed medication, ordered x-rays, and restricted claimant from any work. X-rays of claimant's left knee revealed medial compartment narrowing with bone-on-bone consistent with arthritis. Marginal and central osteophytes were noted, and no obvious fractures were seen. Because claimant's images were obtained while he was seated in a wheelchair, he was unable to be evaluated for joint effusion. An MRI of the left knee taken February 14, 2014, revealed evidence of osteoarthritis, a joint effusion, and a medial meniscus tear, though it was "difficult to tell if this is a traumatic tear or degenerative tear."[6]

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[3] *Id*. at 38-39.

[4] *Id*. at 14-15.

[5] *Id*., Cl. Ex. 3 at 10.

[6] *Id*. at 3.

Dr. John Estivo examined claimant at respondent's request on February 28, 2014, for a medical evaluation. Claimant's chief complaint was left knee pain. Dr. Estivo reviewed claimant's medical records, history, and performed a physical examination, concluding claimant suffers from preexisting advanced osteoarthritis to the left knee. Dr. Estivo wrote:

> He is extremely overweight at 5 feet 7 inches tall and weighing 385 pounds. He does not wear a prosthesis to the right lower extremity. He therefore bears his entire weight across his left leg, particularly his left knee joint. That excessive demand on the left lower extremity has resulted in very advanced arthritis to the left knee. It is my opinion this patient had an aggravation to his preexisting advanced arthritis to the left knee when he stepped out of his truck on 01/15/2014. The prevailing factor regarding this patient's left knee pain would be his preexisting advanced osteoarthritis and not the incident of 01/15/2014.[7]

Dr. Estivo recommended claimant continue treatment for left knee preexisting arthritis through his family physician and Dr. Lairmore. Dr. Estivo opined claimant requires no further treatment and has incurred no impairment in relation to the incident of January 15, 2014.

Dr. C. Reiff Brown examined claimant on May 14, 2014, at claimant's counsel's request. After reviewing claimant's medical history, the report prepared by Dr. Estivo, and performing a physical examination, Dr. Brown determined claimant sustained a "contusion/sprain of the left knee and ankle which is superimposed on severe pre-existing degenerative arthritis involving these areas."[8] Dr. Brown noted claimant requires continued treatment and consideration of a total joint replacement. Moreover, Dr. Brown opined claimant sustained an approximate 60 percent permanent partial impairment of function to the left lower extremity with approximately 1/3, or 20 percent, attributable to the incident of January 15, 2014. Dr. Brown wrote:

> In my opinion, this accident is primarily the prevailing factor in causing this man's present condition and inability to function in the workplace. In my opinion, permanent work restrictions cannot be determined at this point in time as rehabilitative measures are yet to be taken. I see no reason why this man cannot operate a truck once properly placed in the driver's seat. Certainly regaining his ability to accomplish this will require extensive effort on his part.[9]

Claimant has not worked since January 15, 2014.

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[7] P.H. Trans., Resp. Ex. 1 at 7.

[8] P.H. Trans., Cl. Ex. 1 at 2.

[9] *Id*. at 3.

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-501b states, in part:

(a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2013 Supp. 44-508 states, in part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

. . . .

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor.

An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(I) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(I) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words “arising out of and in the course of employment” as used in the workers compensation act shall not be construed to include:

(I) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[11]

ANALYSIS

The ALJ found claimant's injury arose out of and in the course of his employment with respondent. The undersigned Board Member disagrees.

The record supports claimant aggravated a preexisting condition when he felt pain while getting out of his truck. Dr. Lairmore's records show claimant receiving regular injections to his left knee for twelve years prior to the alleged accident, beginning in 2002. On September 9, 2002, Dr. Lairmore wrote "a total knee arthroplasty would be a last resort" for helping claimant's knee pain.[12] On November 4, 2003, Dr. Lairmore wrote, "[Claimant] is here today for an injection of his knee as total knee replacement would be extremely risky in this patient."[13]

Dr. Estivo acknowledged claimant had a long history of chronic left knee pain prior to his alleged injury. Dr. Estivo noted claimant's excessive weight, excessive demand on the left lower extremity resulted in very advanced arthritis to the left knee. Dr. Estivo diagnosed preexisting advanced osteoarthritis to the left knee, unrelated to claimant's alleged accidental injury.

Dr. Brown diagnosed a contusion/sprain to the left knee, superimposed on a severe preexisting degenerative arthritis. Dr. Brown did not review claimant's pre-injury medical records, nor did he comment on claimant's extensive preexisting medical history. It would be improbable that Dr. Brown could state with any accuracy claimant's condition had worsened without some basis upon which to compare pre- and post-injury conditions.

The undersigned Board Member finds claimant solely aggravated or exacerbated a preexisting knee condition. This claim is barred by K.S.A. 44-508(f)(2). All other issues raised by respondent are moot.

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[10] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[11] K.S.A. 2013 Supp. 44-555c(j).

[12] P.H. Trans., Resp. Ex. 2 at 43.

[13] *Id.* at 41.

CONCLUSION

Claimant failed to prove he suffered and injury by accident arising out of and in the course of his employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge John D. Clark dated June 19, 2014, is reversed.

IT IS SO ORDERED.

Dated this _____ day of August 2014.

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HONORABLE SETH G. VALERIUS
BOARD MEMBER

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Honorable Ali Marchant, Administrative Law Judge